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No. 87-1245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANT, AND BRIEF ATTACHED.

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Appellees.

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANT, AND BRIEF ATTACHED.

STATEMENT

The American Booksellers Association, Inc. (referred to as AMICUS) hereby respectfully moves for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief amicus curiae in this case. The consent of the attorney for Appellant has been obtained and filed with the Court. The consent of the attorneys for Appellees has not been obtained.

THE AMICUS

The *amicus'* members distribute and/or sell books and periodicals and other printed materials of all types, including those which are scholarly, literary, scientific, artistic, educational and entertaining.

The American Booksellers Association, Inc. (ABA) is the only national association of booksellers in the United States. ABA has approximately 4,000 members which maintain approximately 7,000 branches located in each of the fifty States. Its members consist of private bookstores, department bookstores, university bookstores and chain bookstores that sell to the public books of general interest that account for approximately seventy (70%) percent of all sales of books by general interest bookstores.

INTEREST OF THE *AMICUS*

The interest of the *amicus* reflects their interest in the decisions of this Court involving differential taxation of First Amendment protected materials. Amicus' brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell books, magazines and other printed material protected by the First Amendment.

Although the case *sub judice* involves only magazines, the statute upheld by the Court below (and similar statutes in other jurisdictions)[1] also involves content based exemption from taxes of books of a purely religious nature. The tax on books and magazines published and/or sold by *amicus* affects the total price that consumers must pay for books and magazines that do not qualify for the exemption and, consequently, affects the number of books and magazines likely to be sold.

In view of the foregoing, *amicus* seeks leave to file the attached brief.

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[1] See Appendix A for schedule of States exempting religious publications.

Respectfully submitted,

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OCTOBER TERM, 1987

TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC. AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANT.

STATEMENT

The American Booksellers Association, Inc. (referred to as *amicus*) submits this brief *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the appellant Texas Monthly, Inc., having submitted a motion for permission to file same.

INTEREST OF THE *AMICUS* AND SUMMARY OF ARGUMENT

The interest of the *amicus* reflects its interest in the decisions of this Court involving content based taxation of First Amendment protected materials. Amicus' brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell books, magazines and other printed material protected by the First Amendment.

Although the case *sub judice* involves only magazines, the statute upheld by the Court below (and similar statutes in other jurisdictions) also involves content based exemption from taxes of certain books of a purely religious nature. The tax on books and magazines published and sold by *amicus* affects the total price that consumers must pay for books and magazines that do not qualify for the exemption and, consequently, affects the number of books and magazines likely to be sold by *amicus*.

The Texas statute collides with the First Amendment's prohibition against content-based distinctions by government – what Harry Kalven, Jr. termed "the consensus on untouchable content."[2] " 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Arkansas Writers' Project, Inc. v. Ragland*, ___ U.S. ___, ___ 107 S.Ct. 1722, 1727-1728 (1987), quoting *Regan v. Time, Inc.* 468 U.S. 641, 648-649 104 S.Ct. 3262, 3266-3267 (1984).

Beyond question, the statute requires the State of Texas to differentiate one group of publications from the next based on their message. At its core, this is an illegitimate task for government, for it necessarily involves the favoring of one type of speech over another. Whatever the purported reason to support the distinction – and throughout history the reasons have been many and subtle – an assessment that certain speech shall receive more preferential treatment than other speech clashes with the central notion that all ideas command equal validity and shall be freely judged by the individual. As the Supreme Court wrote

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[2] *A Worthy Tradition* 6 (Jamie Kalven ed. 1988).

in *Police Dep't of Chicago v. Mosley*, "there is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." 408 U.S. 92, 96, 92 S.Ct. 2286, 2290 (1972) (hereinafter "*Mosley*").

This core notion that content-based discrimination is repugnant under the First Amendment is what fueled the Supreme Court's decision in *Arkansas Writers' Project Inc., v. Ragland*, as it had in *Mosley* and many other decisions. *See, e.g., Regan v. Time, Inc. supra, Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 100 S.Ct. 2236 (1980) (etc.). *Mosley*, like the case at bar, gave preferential treatment to one category of speech by exempting it from a regulation which had the overall effect of burdening speech. There, also, the exemption was justified by a rationale separate and apart from the content of the speech. As the Supreme Court there held, "(the government) may not select which issues are worth discussing or debating . . . " 408 U.S. at 96, 92 S.Ct. at 2290. No matter what the justification for the religious exemption here contested, the statute conveys a message that the State of Texas selects religion as a more valuable subject of public discussion than others. Although the coercive effect of the Texas law may not be as blunt as in *Mosley*, it is nonetheless present, for the statute invites publishers to mold their works to fall within the statute (and hence avoid the sales tax burden), instead of leaving to the editor decisions as to content. This channeling of content by the State is fundamentally at odds with constitutional doctrine and warrants this Court's overturning of the Texas statute.

The second and related defect in the Texas statute centers on the official scrutiny of text that must occur as the statute is applied. The very specter of government review of written material is contrary to our constitutional tradition. Moreover, the statute calls upon the judgment of some government official to determine whether the contents of a publication "consist *wholly* of writings *promulgating* the *teachings of the faith*." Texas Tax Code Section 151.312. This is far too reminiscent of the censor's iron rule over what qualifies as true faith. Take for example, two periodicals, one that applies Christian teachings on the brotherhood of man, excerpted from the New Testament, to

biblical parables, and one which applies the same excerpts to modern-day regional conflicts. The statute thrusts the State into the role of determining whether one or both of these publications promulgates the teachings of Christianity. A more inappropriate and repressive role for government cannot be imagined.[3] Content-discrimination, by definition, places the State in the role of judge, and thus usurps the right of the individual to assess ideas for himself.

The court below, invoking the Equal Protection Clause, held the tax exemption in question to be constitutional on the ground that "[t]he legislature may make rational distinctions of degree having a rational basis." (App. 3, App. 25)[4] In so doing it applied the rational basis test, citing several Texas Court decisions as well as *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868 (1936). That court appeared to ignore the clear mandate of *Arkansas Writer's*, *supra* at 1728, holding:

> Arkansas faces a heavy burden in attempting to defend its content based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end. *See, Minneapolis Star*, 460 U.S. at 591-592, 103 S.Ct., at 1375.

The court below further justified its finding of constitutionality on the ground that the tax exemption constitutes a subsidy and that "the failure of the State to subsidize speech does not

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[3] In this manner, the statute also runs afoul of the establishment clause, as explicated in Plaintiff's Jurisdictional Statement. The two clauses of the First Amendment unite in their respect for the individual's right to his beliefs. "The freedom of speech clause of the First Amendment has been the beneficiary of the religion clauses. . . . In America there is no heresy, no blasphemy." Kalven, *supra*, *A Worthy Tradition* at 7; See also *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971).

[4] References to the original opinion of the court below are contained in Appellant's Appendix (App. 23-41); references to the opinion on rehearing are contained in Appellant's Appendix (App. 1-22).

significantly interfere with First Amendment rights." (App. 30, App. 9-10) (citing *Regan v. Taxation With Representation of Washington*, 461, U.S. 540, 103 S.Ct. 1997 (1983). In so doing the court below appears to be relying entirely upon the argument set forth in the dissenting opinion of Justice Scalia in *Arkansas Writer's* in its statement about "coercion":

> However, Texas Monthly has not shown that the legislature's failure to grant this benefit to other types of publications has "coerced" them into restricting their right to free speech. (App. 31-Appellant).

REASONS FOR GRANTING THE APPEAL

THE TAX EXEMPTION VIOLATES THE FIRST AMENDMENT

The Texas statute constitutes an unconstitutional violation of the First and Fourteenth Amendments by differentially exempting from tax the sale of periodicals and of books. Since the basis for such differential treatment is the religious source or the religious content of presumptively First Amendment protected material, such exemption violates both the speech and establishment clauses of the First Amendment and The Equal Protection Clause of the Fourteenth Amendment. In light of the many jurisdictions with similarly unconstitutional exemptions, the issue should be resolved by this Court.

Unless this Court is prepared to overrule *Arkansas Writer's Project, Inc. v. Ragland*, ____ U.S. ____, 107 S.Ct. 1722 (1987), and *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983), it is clear that it must apply a standard of heightened scrutiny in examining the content based approach to taxation of magazines and books found in the sales tax statute that is the subject of this appeal. *Arkansas Writer's, supra*, at 1728; *See Minneapolis Star*, 460 U.S. at 591-592, 103 S.Ct., at 1375.

The State of Texas has failed to advance any compelling state interest to justify the differential taxation of magazines and books resulting from the tax exemption at issue. Certainly the state's

general interest in raising revenues is insufficient. *Arkansas Writer's*, *supra*, at 1728; *Minneapolis Star*, *supra*, 460 U.S. at 591-592, 103 S.Ct., at 1375. The only other state interest alluded to by the court below is its interest in furthering the "secular purpose" of "restricting the fiscal relationship between church and State." (App. 3, App. 26-27). This argument is flawed in two respects:

> (1) Carried to its logical conclusion it would require that "the church" be exempt from all taxes of any kind so as to "restrict the fiscal relationship between church and State, . . . and . . . reinforce the desired separation insulating each from the other." (App. 5, App. 26-27); and
>
> (2) The statute in question is not applicable only to printed materials that are "published or distributed by a religious faith, but also to "books that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith," (App. 56) even if published by secular publishers.

In any event, a discriminatory tax exemption is hardly the least intrusive method of accomplishing such a result.

Perhaps the most serious failing of the opinion of the court below was its failure to acknowledge the long-established principle that government has no power to restrict expression because of its message. Indeed, this Court made that very point in *Arkansas Writer's* when it held:

> Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Department of Chicago* v. *Mosley*, 408 U.S., at 95, 92 S.Ct., at 2289. *See, Also, Cary* v. *Brown*, *supra*, at 462-463, 100 S.Ct. at 2291. 'Regulations which permit government to discriminate on the basis

> of the content of the message cannot be tolerated under the First Amendment.' *Regan v. Time, Inc.*, 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267 (1984).

Nevertheless, on rehearing, the court below identified a tax which "targets a small group within the press as a whole" as one of two impermissible types of taxes against the press found in *Arkansas Writer's*, (App. 9). It distinguished the tax exemption there by holding it singled out a very small group of magazines for taxation, while in the instant case "the great mass of publishers remain subject to the sales tax." (App. 9). Thus, the court below interpreted *Arkansas Writer's* as holding that the exemption from tax of a favored few publishers was constitutionally permissible while an exemption favoring a large majority of publishers is impermissible. Such an incongruous interpretation of *Arkansas Writer's* ignores the crux of that decision:

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content. *Arkansas Writer's*, *supra* at 1727-28.

In order to determine whether a book or magazine is subject to sales tax, Texas's enforcement authorities must necessarily examine the content of the message that is conveyed. "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's*, *supra*, at 1728; *See Regan v. Time, Inc.*, 468 U.S. 641 at 648, 104 S.Ct. 3262, at 3266.

The court below, in rejecting the applicability of the First Amendment to this issue, places heavy reliance upon *Regan v. Taxation With Representation*, *supra*. It summarizes *Regan* by stating "[i]n short, the Supreme Court held that the failure of the State to subsidize speech does not significantly interfere

with First Amendment rights." (App. 30) The opinion then attempts to show that the same logic is applicable to the issue in the instant case.

However, that same argument was apparently made and rejected in *Arkansas Writer's*. The core of the dissent of Justice Scalia, with whom Chief Justice Rehnquist joined, is that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right and thus is not subject to strict scrutiny." *Arkansas Writer's*, *supra*, at 1731 quoting from *Regan* v. *Taxation With Representation of Washington*, *supra*, 461 U.S. 540, 544, 549, 103 S.Ct. 1997, 2000, 2002. The majority opinions in both *Minneapolis Star*, and *Arkansas Writer's*, clearly rejecting the "subsidy" argument, held that "strict scrutiny" is the proper standard to be applied to a statute differentially exempting from tax First Amendment protected materials of the same genre.

The court below also appeared to rely heavily on the argument set forth by Justice Scalia in his *Arkansas Writer's* dissent:

> The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' on a fundamental right is that – unlike direct restriction or prohibition – such a denial does not, as a general rule, have a significant coercive effect. *Arkansas Writer's*, *supra*, at 1731, (Justice Scalia dissenting).

However, the "coercion" criterion conflicts with the well established principle that a government benefit may not be conditioned on a requirement that violates the beneficiary's constitutional rights. *See Speiser* v. *Randall*, 357 U.S. 513, 518-19, 78 S.Ct. 1332, 1338 (1958) (tax exemption could not be conditioned on signing of a non-communist affidavit); *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 99 S.Ct. 2282 (1979). Clearly, the possible withholding of tax exemption in *Speiser* was not coercive in the normal sense of the word. The conclusion appears inescapable, therefore, that accepting the "coercion criterion" requires the abandonment of the well established principles set forth in *Speiser* and its progeny.

THE TAX EXEMPTION VIOLATES THE EQUAL PROTECTION CLAUSE

When the Equal Protection Clause is applied to legislation affecting fundamental rights such as free speech and press, the "strict scrutiny test" is invoked. See *Massachusetts Board v. Murgia*, 424, U.S. 307, 96 S.Ct. 2562 (1976). That standard calls for a rigorous review, as summarized in *Antioch v. Candidates Outdoor Graphic Services*, 557, F. Supp. 52 (N.D. Cal. 1982).

> First, the law is presumptively unconstitutional and the State bears the burden of justification . . . Second, the law must bear a 'substantial relation' to a 'weighty' governmental interest . . . The law cannot be justified merely by the showing of some legitimate governmental interest . . . Third, the law must be the least drastic means of protecting the governmental interest involved; its restrictions may be 'no greater than necessary or essential to the protection of the governmental interest.

557 F. Supp. at 55.

There is nothing in the opinion of the court below to indicate that the State of Texas has proven such a compelling or weighty State interest. The argument that by financially assisting the church Texas has furthered the cause of separation of church and State is not only ludicrous, but flies in the face of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971).

CONCLUSION

Content based tax exemptions for some, but not all magazines, or some, but not all books, are unconstitutional. Such exemptions exist under the sales tax laws of many states other than Texas. We, therefore, respectfully urge this Court to accept the appeal of Appellant, or, in the alternative, to reverse the judgment of the court below.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATES THAT SPECIFICALLY EXEMPT RELIGIOUS BOOKS

Alabama – printed or illustrated lessons distributed by religious organizations without charge to pupils in Sunday schools, etc., operated by organization.

Georgia – Holy Scriptures; sales of religious papers by religious organizations.

Indiana – sales of Bibles and prayer books by religious organizations.

Maine – the Bible.

Massachusetts – books used for religious worship.

New Jersey – sacred scriptures.

North Carolina – the Bible.

North Dakota – religious material.

Pennsylvania – Bible.

South Carolina – the Bible.

Tennessee – religious publications.

Texas – Old and New Testaments, Koran, other religious works.